

April 13, 2011

**BEFORE THE COPYRIGHT OFFICE
LIBRARY OF CONGRESS**

**RE: FEDERAL COPYRIGHT PROTECTION OF SOUND RECORDINGS
FIXED BEFORE FEBRUARY 15, 1972**

DOCKET NO. 2010 – 4

**REPLY COMMENTS OF THE ASSOCIATION OF RESEARCH LIBRARIES
AND THE AMERICAN LIBRARY ASSOCIATION**

The Association of Research Libraries¹ and the American Library Association² appreciate this opportunity to provide reply comments on the important question of the desirability of bringing under federal protection sound recordings fixed before February 15, 1972 (“federalization”). We appreciate the concerns raised by comments in favor of federalization; the seeming variety of state laws and uncertainty in the library community about the availability and scope of exceptions under state law are clearly deterring important preservation and access activities at libraries around the country. While federalization is one response to these concerns, we believe such a change would create significant additional challenges for libraries, which we discuss below. We also believe that the Copyright Office could do significant good for the library community by simply confirming the availability of a flexible fair use doctrine under state law in all 50 states.

Federal Copyright Protection Creates Significant Challenges for Research and Preservation Activities

Many of the comments in this proceeding support federalization, but even these comments note the many ways that federal law fails to accommodate established library practice. The comments filed in this proceeding are consistent with what independent studies, including ARL’s own recent report “Fair Use Challenges in Academic and Research Libraries,” have argued: concerns about strictures in federal law too often operate as a hindrance to legitimate (and important) library activities.³ At the same time, any effort to change federal copyright law to the

¹ The Association of Research Libraries (ARL) is a nonprofit organization of 126 research libraries in North America. Its mission is to influence the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve.

² The American Library Association (ALA) is a nonprofit organization with more than 63,000 members at all types of libraries including public, academic, and K-12 school libraries.

³ See Association of Research Libraries et al., *Fair Use Challenges in Academic and Research Libraries* (Dec. 2010). Based on extensive interviews with working librarians, the authors conclude that uncertainty about federal copyright provisions has led to “downsizing, postponing, and shelving courses, research projects, digitization initiatives, and exhibits....” *Id.* at 1. Other reports that reach this conclusion include: National Recording Preservation Board, *The State of Recorded Sound Preservation in the United States: A National Legacy At Risk in the Digital Age* 120 (Aug. 2010) (concluding Section 108 is inconsistent with best practices in preservation, and that uncertainty

significant degree necessary to make it more accommodating is likely to be quite complicated, and could risk making the situation worse, rather than better, for libraries.⁴

Federalization would create two specific challenges for libraries: extraordinarily high statutory damages, and cramped specific exceptions for library activities.

Excessive Statutory Damages and Other Federal Remedies

Statutory damages are by far the most chilling aspect of federal copyright protection. The Copyright Act provides for statutory damages of \$750 to \$30,000 *per work* infringed for registered works, and the penalty can be increased to \$150,000 per work for “willful” infringement.⁵ Small-scale file-sharers have faced multi-million dollar penalties under this regime.⁶ Multiplied across a typical library mass digitization project, even per-work penalties on the lower end of the statutory spectrum could easily add up to devastating penalties. As the Electronic Frontier Foundation notes in its comments, “The potential for excessive damages can stifle creativity and innovation for fear of liability even where copyright infringement is deemed to be only a small risk.”⁷ Indeed, ARL found in its interviews with academic and research librarians that many librarians were especially chary of digital preservation and access activities involving music due to the multi-million dollar verdicts involved in high-profile file-sharing lawsuits brought by record company plaintiffs.⁸ This was true

about fair use limits its usefulness for generally risk-averse institutions); J. Besek, *Copyright Issues Relevant to Digital Preservation and Dissemination of pre-1972 Commercial Sound Recordings by Libraries and Archives* 45 (Dec. 2005) (concluding libraries would benefit from more flexible standards for digital copying in federal law).

⁴ See, e.g., Comments of Kenneth Crews at 2 (“[T]he decision to bring works lacking full protection under the federal system not only has implications for creators’ rights, but also for the structure and reach of statutory exceptions.”) Crews suggests a comprehensive review of these implications prior to federalization, but worries that even if such a review were to be undertaken, Congress may not pay heed, referring to the “unevenness of congressional attention” to such niceties in the past. It is also noteworthy that the Recording Industry Association of America, an influential player in copyright policymaking, believes federalization would be “prejudicial to rightsholders.” Comments of the RIAA and A2IM at 2 (“[P]rivate agreements...are much more efficient and effective means for improving preservation and access than any legislative change.”). A legislative process will necessarily involve rightsholder stakeholders, such as the RIAA, who could demand narrower rather than broader library exceptions in exchange for acquiescence to federalization.

⁵ 17 U.S.C. § 504(c). The Copyright Act also provides for reduced damages in some cases for “innocent infringers” and employees of non-profit educational institutions who have a good faith belief that their activities constitute fair use. This reduces, but does not eliminate, the risk that a library will face high statutory damages awards.

⁶ For example, a graduate student convicted of sharing 30 songs on a peer-to-peer network was initially ordered to pay \$675,000, which the judge reduced to \$67,500. Ashby Jones, “What’s the Appropriate Punishment for Illegal Downloading?” WALL STREET JOURNAL LAW BLOG, <http://blogs.wsj.com/law/2011/04/05/whats-the-appropriate-punishment-for-illegal-downloading/>, April 5, 2011.

⁷ Comments of the Electronic Frontier Foundation at 15.

⁸ The Association of Research Libraries et al., *supra* n.3, at 3.

despite the fact that none of these high-profile lawsuits involved a nonprofit, educational use.⁹

In addition to statutory damages, the Copyright Act provides for several other remedies not necessarily available at common law. Rightsholders can recover any profits of the infringer that are attributable to the infringement,¹⁰ in addition to actual damages incurred by the copyright owner. The Act also creates presumptions in favor of rightsholders demanding profits from alleged infringers: A plaintiff rightsholder need only establish gross profits of an accused infringer, then the burden shifts to the accused infringer to show deductible expenses and portions of profit not attributable to the alleged infringement. Federal law also authorizes impounding and destruction of infringing articles and any “other articles by means of which such copies or phonorecords may be produced.”¹¹ Finally, federal law overrides the default rule that each party bears its own litigation costs, allowing rightsholders to demand that alleged infringers pay their costs and attorneys’ fees, which can be very significant.¹²

Remedies under state common law are mild by comparison. For a tort such as copyright infringement, unfair competition, or misappropriation, the remedy will be based on the general principle that the plaintiff should be restored to the position she would have been in absent the tort. Remedies for common law infringement will thus consist primarily of awarding to the rightsholder provable lost profits attributable to the infringement. As such losses will be highly speculative or non-existent for library uses (especially preservation), it is highly unlikely libraries would face the threat of high-stakes litigation at common law that is available to rightsholders under federal law.¹³ Also, while it is possible that a common law court could award a plaintiff the alleged infringer’s profits from infringing, the common law does not feature a burden-shifting doctrine like the federal provision discussed above; rightsholders, not libraries, will bear the burden of showing which profits must be surrendered, if any.

State civil and criminal anti-piracy statutes sometimes provide for more draconian remedies, but these typically apply to commercial behavior, using language such as “intent to sell” or “for commercial profit” to define the

⁹ Indeed, the RIAA and A2IM argue in their Comments that because none of their members have brought lawsuits against libraries for preservation activities, the specter of liability “is largely not a factor or hindrance, by itself, to preservation activity.” Comments of RIAA and A2IM at 19. Perhaps the absence of legal action *should* signal to librarians and archivists that they can go forward with important work despite the possibility that it may be a “technical” violation of the law, but our research suggests that this has not been the effect of the rightsholders’ forbearance. See ARL et al., *supra* n. 3, at 3.

¹⁰ 17 U.S.C. § 504(b).

¹¹ 17 U.S.C. § 503.

¹² 17 U.S.C. § 505.

¹³ As Timothy Brooks argues in his comments, most of the sound recordings that libraries would preserve and make accessible have long ago exhausted their commercial potential. Comments of Tim Brooks, Association for Recorded Sound Collections at 3. While the common law can take into consideration the negligible harm to rightsholders in these cases, statutory damages sever the connection between damages and harm.

offense.¹⁴ Non-profit libraries and archives are unlikely to fall on the wrong side of these laws.¹⁵

Cramped Limitations for Libraries

Many of the comments in this proceeding highlight the inadequacy of the library and archives exceptions in the Copyright Act, which are found primarily in Section 108. As commenters observe, these exceptions simply do not reflect the realities of modern digital scholarship and the best practices at modern academic and research institutions. The limitations they impose are outdated and can cause real harm to libraries, archives and the public they serve. Patrick Loughney of the Library of Congress takes a representatively dim view, saying of Sections 108(b) and (c), for example, that they “are of little real benefit to libraries, archives and other institutions that preserve and provide public access to sound recordings.”¹⁶ Indeed, Section 108 suffers from several deficiencies.

First, Section 108 places strict limits on when and to what extent a library or archives can make copies for preservation or access. As Loughney points out, the allowance of only three copies for preservation is inconsistent with current best practices for digitization of audio materials, which include making a variety of digital copies in a variety of formats, stored in a variety of locations. Equally frustrating is the statutory assumption that some items should not be preserved until they are already damaged, deteriorating, or otherwise endangered. Indeed, Loughney suggests that to obey the letter of the law on this point “could constitute malfeasance on the part of a professional librarian or archivist.”¹⁷ It risks the loss of important cultural artifacts, and raises the costs of preservation considerably and unnecessarily.

The utility of these provisions is also significantly impaired by the requirement that digital copies be accessible only on the premises of the library or archives (if at all).¹⁸ As Eric Harbeson of the Music Library Association notes, institutions that fund preservation and digitization projects expect the resulting digital files

¹⁴ See, e.g., Jaszi, P., *Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis* 9 (September 2009) (“[T]he statutes in all 10 states contain explicit language stating that the unauthorized use must be made with ‘intent to sell,’ for ‘commercial profit,’ or some other language indicating a commercial nature to the unlawful activity.”).

¹⁵ See J. Besek, *supra* n. 3, at 22 (“On the basis of our review of statutes in states other than California, there does not appear to be a significant risk of criminal liability for nonprofit archiving and preservation activity.”) California’s criminal statute has an exception for non-profit archiving and preservation, but requires institutions to make certain efforts to obtain permission before acting. See also Comments of Randy Silverman and Alison Mower at 2 (citing Utah’s Unauthorized Recording Practices Act, which includes an exception for “any person transferring any such sounds without any compensation being derived by this person or any other person from the transfer,” as more accommodating for preservation than federal law).

¹⁶ Comments of Patrick Loughney at 5. See also, National Recording Preservation Board, *The State of Recorded Sound Preservation in the United States: A National Legacy At Risk in the Digital Age* at 120-21 (“Section 108...has failed to keep pace with best practices currently followed by the audio engineering and the federally and privately funded restoration communities.”).

¹⁷ Loughney, *supra* n. 14, at 5.

¹⁸ See 17 U.S.C. 108(c)(2).

to be widely accessible; limits on access discourage funding for digitization projects, including digital preservation projects.¹⁹ It also frustrates the expectations of contemporary scholars that a library's digital resources will be easily and instantly accessible from any Internet connection. Many of the comments argue that libraries need a legal framework that will "provide certainty" for conservative funders and administrators who worry digitization activities with an access component are clouded by copyright liability.²⁰ The limited access allowed under Section 108 falls short of that need.²¹

Section 108(h) allows for more liberal scholarly and preservation use by libraries and archives of works during the last 20 years of their copyright term. This exemption is subject to a few conditions, however: the work must be published, and it must not be "subject to normal commercial exploitation" or obtainable (new or used) at a reasonable price, and the exception does not apply to any downstream uses by a library or archives' patrons. The Society of American Archivists writes in its comments, "Archivists have not used 108(h) extensively as of yet," citing the narrow scope of the provision, the ambiguity of key terms, and the administrative difficulty of tracking which works satisfy the exception.²²

These and other shortcomings of Section 108 prompted the Library of Congress and the Copyright Office to convene the Section 108 Study Group several years ago to consider updates to the statute. The Group produced a substantial report but was unable to achieve consensus around workable solutions, which illustrates the difficulty of framing balanced statutory exemptions in what has become a highly contentious policymaking environment. Consensus solutions to the "orphan works" problem have been equally elusive, despite considerable effort at the Copyright Office and elsewhere. These efforts suggest that while current law has clear flaws, 'opening up' the law is far from certain to yield improvement.

In sum, federalization would raise the specter of statutory damages for libraries and archives considering digitization and other preservation and access

¹⁹ Comments of Eric Harbeson at 3. *See also* Comments of the Society of American Archivists at 3 ("Furthermore, the funding and scope of preservation programs are closely related to the extent to which the preserved items can be made readily available for research use.").

²⁰ *See* Comments of the Society of American Archivists at 3 ("Our worry is that as institutional lawyers and preservation funders become more aware of the uncertain legality of providing access to pre-1972 sound recordings, they will remove their support for archival access programs and everyone will suffer."); Comments of K. Matthew Dames at 6 ("Unfortunately, the lingering legal uncertainty over the ability of scholarly institutions to make their holdings available to the communities they serve dampens ambitions and hampers initiatives."); Comments of Tim Brooks at 3 ("The rules by which such [academic] use can be made need to be clear, uniform and rational."); Comments of Patrick Loughney, Ph.D., at 3 ("the uncertain legal treatment even for preservation copying, much less the ability to ultimately make these materials available, makes archive and education officials reluctant to fundraise for, or allocate resources for the acquisition and preservation of the culturally valuable material.")

²¹ Indeed, Randy Silverman and Alison Mower of the University of Utah claim that federalization would discourage preservation activities in Utah, which has a much broader exemption for non-profit copying of sound recordings. Comments of Randy Silverman and Alison Mower at 2. Notably, Utah's exception for non-profit uses is likely typical of state law. *See* J. Besek, *supra* n.3.

²² Comments of the Society of American Archivists at 10.

initiatives for pre-1972 sound recordings, while federal exceptions specifically for research and preservation are in tension with best practices currently in place at these institutions. The Copyright Office should weigh these risks as it considers whether to federalize protection for pre-1972 sound recordings.

State Law Could Be Hospitable to Research and Preservation Needs

The majority of the comments in this proceeding cite the lack of clarity and the perceived lack of exceptions in state law as the principle reasons to support federalization.²³ Clarity is certainly needed, but these comments likely overestimate the importance of specific exceptions, and, in some cases, are mistaken about the lack of exceptions in state law. Specific exceptions are helpful (if hard to come by) in the federal context because federal copyright law covers a host of library activities, and the consequences for violating federal copyright can be quite dire. In the state context, however, access to a flexible fair use defense may well be all that is needed to empower libraries and archives to go forward with important preservation and access initiatives.

For many aspects of state civil and criminal law, exceptions appear to be simply unnecessary. State anti-piracy statutes are typically much narrower than federal law: they bar unauthorized commercial reproduction, but do not apply to non-profit uses.²⁴ This seems to be true of other common law tort claims that could be substitutes for copyright protection, such as unfair competition or misappropriation.²⁵ By tailoring protection to cover only the behaviors that pose a real economic threat to rightsholders, these state regimes sidestep the thorny question of how to craft useful exceptions for non-profit activities. Only state common law copyright raises the question of whether exceptions are available to encourage preservation, research, and other important functions of libraries and archives.

²³ See, e.g., Comments of the Society of American Archivists at 3 (“The explicit and broad preservation exception...in 108(b) would be a definite improvement over the current confused state of the law”); Comments of Tim Brooks, ARSC, at 2 (“The law desperately needs clarity, ‘bright lines’ that holders of these recordings (both public and private) can understand.”); Comments of the Electronic Frontier Foundation at 4 (“Federal jurisdiction, on the other hand, would offer a legal protection scheme for pre-1972 sound recordings in which clear checks on copyright exclusivities allow creative expression and add-on innovation to flourish.”); Comments of Eric Harbeson, MLA, at 4 (“Most importantly, libraries would have access to fair use defenses and exemptions provided under §108.”); Comments of K. Matthew Dames at 5 (“[T]he lack of certainty [surrounding works protected by state law] introduces a level of legal risk that should not exist given that there are clear and current Federal limitations that allow such activities.”).

²⁴ See, e.g., J. Besek, *supra* n. 3, at 39 (“Our review suggests that digital preservation and streaming of pre-1972 sound recordings by nonprofit libraries is unlikely to violate state criminal laws.”).

²⁵ *Id.* at 40 (“[I]t seems unlikely that activities within the bounds of what is permitted under § 107 or § 108...would be actionable under state law.... Indeed, it is unlikely that such activities would even elicit a claim.”); Jaszi, P., *Protection for Pre-1972 Sound Recordings under State Law and Its Impact on Use by Nonprofit Institutions: A 10-State Analysis* 18 (September 2009) (“[N]onprofit institutions that use pre-1972 sound recordings would most likely not be found to engage in unfair competition.”). To the extent that these conclusions are tentative or incomplete, the Copyright Office should consider making a stronger statement based on a more comprehensive review of the law. This could be part of the same review and declaration on the issue of fair use.

In this context, there would be great value if the copyright office were to affirm that the fair use doctrine is available under state common law. Fair use is a flexible doctrine that allows users to engage in an open-ended variety of activities that implicate copyright but are, because of the purpose and nature of their use, deemed to be “fair.” The Supreme Court has said fair use is one of the necessary balancing features that prevent copyright from running afoul of the First Amendment;²⁶ without protection for criticism, commentary, and a host of educational and research uses, the copyright monopoly would be an unconstitutional burden on free expression. Since the First Amendment also applies to the states, there could be serious constitutional implications for a state copyright regime that did not recognize fair use. The limited case law that currently exists already suggests that state common law courts will recognize fair use when confronted with the issue.²⁷ Indeed, case law suggests state courts have more freedom to reach fair and equitable results under common law than would exist under the exceptions in federal law.²⁸

Copyright scholars have conducted several partial surveys of state law protection of pre-1972 sound recordings. These surveys typically take a tentative tone, but their conclusions about the availability of fair use are consistently positive. June Besek’s conclusion is typical: “[I]t is reasonable to assume that a common law copyright court would recognize a fair use–type exception to accommodate First Amendment interests.”²⁹ The comments in this proceeding are evidence that these partial and tentative examinations have not reassured members of the library community. The Office should take this continuing uncertainty as evidence for the utility of a clearer, perhaps more comprehensive statement about the availability of fair use under state law.

²⁶ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186 (2003); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 439, 460 (1985).

²⁷ See, e.g., *EMI Records Ltd. v. Premise Media Corp.*, Index No. 601209/08, Sup. Ct. N.Y. (Aug. 13, 2008), available at <http://cyberlaw.stanford.edu/system/files/EMI+v.+Premise+PI+Order.pdf> (“New York cases acknowledge that fair use exists at common law.”).

²⁸ *Capitol Records, Inc. v. Naxos*, 4 N.Y.3d 540, 555 (N.Y. 2005) (“[T]he common law has allowed the courts to keep pace with constantly changing technological and economic aspects so as to reach just and realistic results.”).

²⁹ J. Besek, *Copyright and Related Issues Relevant to Digital Preservation and Dissemination of Unpublished pre-1972 Commercial Sound Recordings by Libraries and Archives* 60 (Mar. 2009).